Appeal from Appellate Decree No.108 OF 1986

Against the judgment and decree dated 4.12.1985 passed by Sri Sheo Narain Gupta,VIth Additional District Judge, Monghyr in M. T. A. No. 8 of 1984 reversing and modifying the judgment and decree dated 20.1.1984 passed by Sri Udaikant Thakur Munsif-Ist Court, Monghyr in Title Mortgage Suit No.77/71 of 1974-79.

SITA RAM SAH----------Appellant
Versus
Md. SAMID BAKSH & ORS----------Respondents

For the appellant : M/s Arvind Kumar Tiwary, Adv.,
Subhash Kumar, Adv.,
Samir Kumar Bharti, Adv.

For the respondents : M/s Keshav Srivastava, Adv.,
V. P. Pandey, Adv.,
Gopal Pandey, Adv.,
Ashok Kumar Sinha, Adv.

P R E S E N T

THE HON'BLE MR. JUSTICE GHANSHYAM PRASAD

WEB COPY NOT OFFICIAL

Ghanshyam Prasad, J. 1. This appeal by defendant no.2 is against the judgment and decree dated 4.12.1985 passed by Additional District Judge VI, Munger in Title Appeal No. 8 of 1984 thereby learned Additional Judge has allowed the appeal of the plaintiff against defendant no. 2 and set aside the judgment and decree dated 20.1.1984 passed by Munsif-I, Munger in Title Suit No. 77/71 of 1974-79 to that extent.

2. The plaintiff/respondent filed the suit for redemption against two defendants including this appellant. The case of the plaintiff in short is that one late Abdul Hamid was the owner of Schedule “A” property of the plaint. He

mortgaged the same to defendant no. 1 through registered deed dated 6.5.1946 for Rs.600/-. Later on in 1957 Abdul Hamid also orally gifted the property to his daughter/ plaintiff/respondent. Thereafter, Abdul Hamid died living behind the plaintiff as his only heir. The further case is that Abdul Hamid on his behalf as well as the plaintiff, during his life time, tendered money to the defendant no. 1 and requested for redemption. On 15.5.1957, the defendant also undertook to vacate the suit property by 1.12.1957 on receipt of mortgage money. Accordingly, plaintiff tendered the mortgage money on 30. 11.1957 to the defendant no. 1 and requested him to vacate the suit land but he neither accepted the mortgage money nor vacate the suit premises. On the other hand, he further undertook to vacate the same on 30.1.1958. However, inspite of repeated tender of mortgage money defendant no. 1 did not vacate the suit land. On the other hand it transpired that he transferred the property to defendant no. 2.

WEB COPY NOT OFFICIAL

3. Defendant no. 1 filed written statement and contested the suit. He admitted about mortgage of suit land by Abdul Hamid in his favour. However, he denied that the plaintiff was the daughter or donee of Abdul Hamid. It is further averred that after execution of mortgage deed Abdul Hamid went to Pakistan and came back only in the year 1958.

At that time, he was in the need of money and therefore he wanted to sell the suit land in favour of defendant no. 1 for Rs.1500/-. Defendant no. 1 paid Rs.1500/- but unfortunately deed was not executed as Abdul Hamid was in hurry to return to Pakistan. However, he handed over original deed to the defendant. Defendant got the lease of the suit land extended and his name was also mutated in municipality and C. O. Office. Later on, he sold the suit premises in favour of defendant no. 2 on 30.4.1974. He denied that plaintiff or her husband ever approached him and tendered mortgage money or they had any right to do so.

WEB COPY NOT OFFICIAL

4. Defendant no. 2 also appeared and filed written statement. Apart from adopting the written statement of defendant no. 1, it is averred that the mortgage is not subsisting. The plaintiff has no right to sue for redemption. The defendant no. 1 was in possession as real owner of the suit premises. He sold the same to him on 30.4.1974 for valuable consideration of Rs.10,000/- and accordingly he has perfected his title being in possession for more than 12 years. He also denied that the plaintiff is the daughter or donee of Abdul Hamid.

5. The learned trial Court framed as many as 7 issues including two important issues which are as follows:-

"Issue no. 5- Is the story of oral gift as set up

by the plaintiff correct?
Issue no. 6- Is the plaintiff entitled to get the decree of redemption. "

6. The judgment of trial court is quite confusing. He has held that Abdul Hamid orally gifted the suit premises to the plaintiff. However, he left issue of daughtership undecided and has not given any finding upon it. Further, he has decreed the suit only against defendant no. 1 who actually did not contest the suit after filing of the written statement and dismissed the suit against this appellant/defendant no. 2.

7. Plaintiff being aggrieved by the judgment of the trial court preferred appeal before the District Judge. Appeal was ultimately heard by Additional District Judge, VI, Munger who allowed the appeal and decreed the suit for redemption against defendant no. 2 also. Defendant no. 2 had also filed cross-objection against the findings of oral gift by Abdul Hamid in favour of the plaintiff. Learned additional judge framed as many as six points for decision of the appeal. However, point no. 2, 3 and 4 are important which are as follows:-

WEB COPY NOT OFFICIAL

(ii) Whether the plaintiff appellant is the daughter of Abdul Hamid.

(iii) Whether Abdul Hamid gifted the mortgage property, i.e. the suit house to the plaintiff appellant and she came in possession thereof.

(iv) Whether the finding of the Court below

regarding the alleged gift in favour of the plaintiff respondent is correct.

8. Learned lower appellate Court after consideration of the evidence of both the parties has held that the plaintiff is the daughter of Abdul Hamid but rejected the findings of the trial Court on the point of oral gift and ultimately allowed the appeal and decreed the suit for redemption against defendant no. 2 also.

9. While admitting the Second Appeal following substantial questions of law have been framed:-

(a) As to whether without framing any issue and deciding the question as to whether the plaintiff is the daughter of Abdul Hamid, the suit could have been decreed ?

(b) In view of the mandatory provision that a material fact asserted in the plaint and denied in the written statement has to form the subject matter of an issue in a suit, which is the bounden duty of the court under Order 14 Rule 1 of the Code of Civil Procedure has been violated or not ?"

WEB COPY NOT OFFICIAL

10. The counsel for the appellant challenged the judgment of the lower appellate Court on the ground that the lower appellate court had no power to decide the question of daughtership of the plaintiff as no such issue had been framed by the trial Court. The other ground is that there are no legal evidence on the record on the point of daughtership. The plaintiff has not discharged the burden of proof as laid down

under Section 50 of the Evidence Act.

11. It requires no mention that the plaintiff has specifically asserted her relationship with Abdul Hamid as daughter in paragraphs 4, 5, 7, 11 and other paragraphs of the plaint. The defendant no. 1 in paragraph 7 of the written statement has evasively denied that the plaintiff was related as daughter of Abdul Hamid. However, in other paragraphs of the written statement no specific denial has been made. Similarly, defendant no. 2 in paragraph 8 of the written statement has evasively denied the averments of daughtership but not parawise. The witnesses adduced on behalf of both the parties would go to show that both the parties have led evidence in support and denial of relationship of plaintiff with Abdul Hamid as daughter.

WEB COPY NOT OFFICIAL

12. It is admitted that lower trial court neither framed any issue on the daughtership nor gave any finding upon it. However, lower appellate Court framed specific issue on this point as issue no. 2 and specifically held that as there was material on the record, he did not consider it proper to remand the same and proceeded to give finding on the point of daughtership.

13. Order XII, Rule 24 CPC gives power to first appellate court to finally decide the suit and pronounce

judgment even after resettling the issues. It runs as follows:-

> "**Rule 24**:- **Where evidence on record sufficient, Appellate Court may determine case finally**.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."

14. On this point there are two decisions of Hon'ble Supreme Court reported in 1988 SC 396 : Bhairab Chandra Nandan v. Ranadhir Chandra Dutta and 1963 SC 884 Nedunuri Kameswaramma v. Sampati Subba Rao.

WEB COPY NOT OFFICIAL

15. In paragraph 6 of Bhairab Chandra Nandan's case (supra) the Hon'ble Apex Court has held as under;-

> '' 6. Learned counsel for the respondent submitted that the appellant has another house situate in Ismail Madan Lane and, therefore, the appellant was not left without alternate accommodation and, as such the appellant has not satisfied the requirements of Section 13(ff) for seeking possession of the leased portion for his own occupation. The house situate in Ismail Madan Lane is said to be more than three miles away from the suit house as per statement of counsel made at the bar. Moreover, the house is not lying vacant. The appellant's witness Mukhtar Ahmed examined as P.W. 2 has deposed that he is a tenant in the house in Ismail Madan Lane and that the entire house is in the occupation of tenants and no portion is lying vacant. Apart from this, it has also to be pointed out that this is a case where the appellant is occupying a portion of the

house and wants possession of the leased portion only by way of additional accommodation. To such a case the condition imposed by Section 13 that " a landlord should not be in possession of any reasonably suitable accommodation" may not be strictly attracted. Otherwise, it would lead to a landlord being asked to disrupt the family and providing accommodation for the members of his family at different places. The respondent's counsel submitted that since no issue has been raised on the question of alternative accommodation being available, the appeal may be remanded to the Appellate Court for evidence being taken and a finding rendered on the question whether the house in Ismail Madan Lane would meet the requirement of the appellant. We do not find any merit in this submission. Though formally no issue was framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the Court to the existence of another house belonging to the appellant in Ismail Madan Lane and the said house being not vacant. There is, therefore no need for the appeal being remanded for a finding on the question whether alternative suitable accommodation is available for the appellant. "

WEB COPY NOT OFFICIAL

16. Similarly, in paragraph 6 of Nedunuri Kameswaramma's case (supra) it has been held as under;-

"(6) On the first point, we do not see how the suit could be ordered to be dismissed, for, on the facts of the case, a remit was clearly indicated. The appellant had already pleaded that this was jeroyti land, in which a patta in favour of her predecessors existed, and had based the suit on a kadapa, which showed a sub-tenancy. It was the respondent who had pleaded that this was a Dharmila inam and not jeroyti land, and that he was in possession of the kudiwaram rights through his predecessors for over a hundred years, and had become an occupancy tenant. Though the appellant had not mentioned a Karnikam service inam, parties

> well understood that the two cases opposed to each other were of Dharmila Sarvadumbala inam as against a Karnikam service inam. The evidence which has been led in the case clearly showed that the respondent attempted to prove that this was a Dharmila inam and to refute that this was a Karnikam service inam. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which we have amply referred already."

WEB COPY NOT OFFICIAL

17. Upon consideration of above facts and decisions of Hon'ble Apex Court and provision of law, it is quite clear that the decision of the lower appellate Court will not vitiate only because no specific issue had been framed by the trial Court. The lower appellate court was quite within its power to resettle and reframe the issues on contentious matter and decide the suit finally. In this case, since both the parties have led evidence on daughtership and there was also such pleadings, the lower appellate court has rightly decided the issue of daughtership in order to dispose of the suit finally.

18. The learned counsel for the appellant

submitted that the evidence adduced on behalf of the plaintiff-respondent on the point of daughterhship is not in accordance with Section 50 of the Evidence Act and hence they must be rejected. However, learned counsel for the respondent submitted that the relationship of the plaintiff with Abdul Hamid as daughter has not been specifically denied by defendants and hence it is deemed to be admitted. The other submission is that there is overwhelming evidence of competent witnesses to prove the relationship.

19. Learned lower appellate Court has dealt with the pleadings of the parties and evidence and has given specific finding upon the relationship. The finding is a finding of fact and therefore this Court should not disturb the findings unless it is found perverse and illegal.

WEB COPY NOT OFFICIAL

20. Learned lower appellate court in paragraph 11 of the judgment after consideration of the averments made in the plaint and written statement has come to the conclusion that this fact has actually been admitted. I have also examined the pleadings of the parties. It appears to me also that the defendants in the written statement have not specifically denied parawise the allegation of relationship.

21. Order VIII CPC deals with written statement, Rules 3 and 4 lay down the rule of denial of the

allegation of fact mentioned in the plaint. They runs as follows;

> " **3**. **Denial to be specific**._ It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.
>
> **4. Evasive denial**.- Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances."

WEB COPY NOT OFFICIAL

22. Rule 5 lays down the rule of presumption which runs as follows;-

> " **5. Specific denial**.- Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.
>
> Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

23. From the above provisions of C.P.C., it is clear that the lower appellate Court has rightly held that the plaintiff is daughter of Abdul Hamid. This Court do not find any ground for interfere in the finding of lower appellate

Court. The learned lower appellate Court has rightly allowed the appeal and decreed the suit against defendant no. 2 also.

24. In the result, this appeal is dismissed on contest with cost.

Lawyer's fee Rs.250/- and

Layer's clerk fee Rs.50/- only allowed.

(Ghanshyam Prasad, J.)

Patna High Court
Dated the 29th July, 2008
N.A.F.R./ **KANCHAN**

WEB COPY NOT OFFICIAL